

## The Mobility Directive – Opportunity for Irish companies

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The Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers, and divisions (the **Mobility Directive**), was to be transposed into Irish law on 31 January 2023. This transposition has not yet occurred and it is expected to be transposed on or around 30 June 2023.

On the Mobility Directive's ultimate transposition into Irish law, what will this mean for Irish limited liability companies? The Mobility Directive's aim is to, within the European Union (the EU):

1. provide for the **first time**, a harmonised, streamlined regime for cross-border conversions and divisions
2. amend the existing legislation relating to cross-border mergers

Ultimately, the Mobility Directive will facilitate group companies within the EU, to restructure when required as part of companies' life cycles.

### **Cross-border conversions**

A cross-border conversion involves the relocation of a company to another EU member state. The company will change its legal form to one which exists in the destination member state, without losing its legal personality.

The company will be required to prepare a governing document (named the common terms of conversion), which must set out the aims and rationales of the conversion. Importantly, it is expected that a members' and employees' report will be required, unless exempted.

It is further proposed that there be a requirement i) for a notice to be disclosed, informing

members, creditors and employees of the terms, and to submit comments on the proposed merger (unless exempted) and ii) that creditors can apply for safeguards and file a claim in the departure member state. Notably, a new rule to avoid an abuse of process has been introduced. Where the relevant authority, on considering the grant of a pre-merger certificate, must consider whether the conversion is being carried out for abusive or fraudulent purposes. If there is any suspicion, the competent authority can extend its decision process by three months.

The measures in the above paragraph are essential, where applicable, so that the interests of concerned parties of the company, namely employees, members and creditors are involved in the process and their rights are protected.

Ultimately, following further steps including a members' resolution and a commercial court application, on conversion, the company will retain its assets, liabilities, members and employees, and only the company's form and location will have changed.

## Cross-border mergers

An EU cross-border merger mechanism, has been in place for some time. Currently, it facilitates the following:

- i. merger by acquisition
- ii. merger by formation
- iii. merger by absorption

The current legislation is to be amended by the Mobility Directive, by introducing the following a fourth option, namely:

- iv. a merger between companies having the same ownership.

This will allow a cross-border merger to occur where one company is dissolved without going into liquidation, transferring its assets and liabilities to the acquiring company, without the issue of any new shares by the acquiring company. This is permitted only where either i) the merging companies are owned by the same person or ii) the members of the merging companies hold their securities and shares in the same proportion in all merging companies.

This new fourth option, further simplifies cross-border mergers for group companies within the EU, especially without the requirement to issue new shares, which is required for a merger by acquisition and merger by formation.

As with cross-border conversions above, the Mobility Directive also proposes changes to current legislation relating to cross-border mergers, to provide further protection to creditors,

employees and members.

## Cross-border divisions

The Mobility Directive provides for either full or partial division whereby the assets and liabilities of a company are transferred to two or more newly incorporated companies. The proposed process and protections are closely similar to that set out above.

## Conclusion

While it remains to be seen how the Mobility Directive is transposed into Irish law, the above changes will facilitate a straightforward conversion or merger of companies. In achieving a more streamlined process, the Mobility Directive also ensures the protection of employees, creditors and shareholders.

*For further information, feel free to contact the authors of this article.*

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